No. 4665.

United States Circuit Court of Appeals

For the Ninth Circuit

K. MATUSAKE,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

OPENING BRIEF FOR PLAINTIFF IN ERROR

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STATEMENT.

The Plaintiff in Error was charged with the violation of the National Prohibition Laws by an information which contained two counts. The jury trial ended wtih a verdict of guilty on both counts.

A motion for a new trial was denied and the sentence imposed was three hundred dollars ($300.00) fine on the first count and three months imprisonment in a county jail on the second, and he now brings the record to this court for review.

Appellant at the time of the trial had conducted a hotel in the two upper floors of a three story brick building for four years at 604½ Sixth Avenue South in the City of Seattle. There is and was a full basement under the building with concrete walls. (See diagram on page 52 of the record.) The room in the front of the basement and the room on the north on the east end of the basement were occupied by the Cascade Soda Water Company. These two rooms were numbered 606 Sixth Avenue South, and the same numbers given in the affidavit for a search warrant and the search warrant.

In the southeast corner of the basement were three small rooms, the one on the east end being the boiler room that furnished hot water for the hotel conducted by appellant. The appellant leased these rooms to an express-man with the reserved privilege of ingress to keep the boiler hot. The express-man kept the doors locked, but appellant had a key to gain admittance when the hot-water boiler needed attention.

The search warrant was dated March 12th, 1924, and on the following day the prohibition officers raided the two rooms numbered 606 Sixth Avenue South, and destroyed a number of barrels of mash that covered the concrete floor. The appellant was given an axe and compelled to assist the officers in their mission of destruction.

When the raiders arrived the appellant and his wife went down to the basement and appellant informed one of the officers, Mr. Whitney, that he was not interested in the two small rooms next to the boiler room and that he leased them to an express-man and showed him a copy of the lease. The officer told appellant that if he would go and get the express-man, the appellant would not be arrested. The appellant and his wife then left and made a search and inquiry for the express-man in the Japanese quarters of the City, but on their return stated to the officer that they could not find him, and the appellant was forthwith arrested, and he was searched and his papers, keys and other effects were taken from him. The appellant's name was not in the warrant and the search was without any authority whatever. The appellant asked for the return of the lease, which by the way had been returned to him, but when searched it was forcibly

taken from him, and when he asked for it's return, a second officer, not Mr. Whitney who searched him, hit him on the mouth and the officer cut his hand on appellant's protruding teeth. (See affidavit pages 33-35-36-27 of the record.)

The prohibition officers never made any attempt to arrest the expressman who owned the liquor. When asked on the witness stand why the officer made no attempt to arrest the expressman, his reply was, "we got the right man" in the presence of the jury.

ASSIGNMENTS OF ERROR.

I.

That the defendant prior to the trial of said cause, filed two motions, one of which was entitled "Motion to Suppress Evidence and Dismiss the Action" and the other was entitled "Motion and Affidavit to Quash Warrant" which said two motions were heard and considered together and were both denied by the court, to which ruling the defendant then and there excepted for the reason and upon the ground that the evidence was illegally and unlawfully seized and obtained, and the defendant's person and premises were illegally and unlawfully seized and obtained, and the defendant's

person and premises were illegally and unlawfully searched and that the search and seizure was made without any valid search warrant, but was made upon the proported search warrant which was in law an invalid search warrant in that the premises searched were not properly described, and further that the search warrant itself failed to state any probable cause for the issuance of the same, and for the further reason and upon the ground that a certain paper taken from the person of the defendant was taken in violation of the Constitution of the United States and particularly in violation of the fourth and fifth Amendments to the Constitution of the United States, which exceptions were by the court allowed and now the defendant assigns as error the ruling of the court upon the said motions.

II.

That during the course and progress of the trial of the defendant herein, the defendant made due and timely exceptions to the introduction of the evidence on the grounds and for the reason that said evidence and also the testimony relating thereto was obtained unlawfully and by virtue of an illegal and void search warrant, which objections were by

the court overruled, and to which ruling exceptions were by the court allowed and now the defendant assigns as error the ruling of the court upon such exceptions.

III.

Thereafter, and within the time limited by law, and the orders and rules of the court, the defendant moved the court for an order granting to him a new trial, which motion was denied by the court, to which ruling of the court the defendant then and there duly excepted and the exception was by the court allowed; and now the defendant assigns as Error the ruling of the court upon the said motion.

MOTIONS TO QUASH AND SUPPRESS.

The appellant moved the court to quash the search warrant and suppress the evidence obtained by means of a search of the body of plaintiff in error. (Record pages 22 to 27 inclusive.)

The search warrant is what is known as a "General Search Warrant," the elements of which are so dangerous to human liberty and the rights to property, that although outlawed in England and America, they are still in use and held valid by some jury trial courts. A brief review of the life of this pernicious writ will not be a waste of time and space.

In 1765, Lord Camden, then Lord Chief Justice of the highest court in England, wrote the opinion in the great case of *Entick vs. Carrington,* reported in Vol. 19 State Trials, page 1063. This decision fully stated what the English law then was and what it had been in the past, and especially denounced the so-called "General Warrants" which were in common use in England up to the time of the writing of the opinion. It was, therefore, an exposition of common law and as such, was the law in America where English rule prevailed. This decision was called the "Land Mark of English Liberty."

With only slight exceptions the declared law of *Entick vs. Carrington* is the same as the Federal Laws of the United States at this time. The most notable exception is in the statement of probable cause for the issuance of the search warrant. A bare bold statement under oath is sufficient in England and was sufficient here until 1791, when the Fourth and Fifth Amendments were adopted. Under the English laws, papers and other property must be described and the fourth Amendment only reiterates what always was the British Law.

Private papers were immune in England the same as they are in the United States.

The American people were not satisfied with the English law that only required a bare bald declaration as a basis for the issuing of a search warrant and no doubt Congress had the decision in *Entick vs. Carrington* in mind when the Fourth and Fifth Amendments were sent to the States for ratification. Then, one year after Lord Camden's great decision was made public, the House of Commons gave its approval of the great Judge's exposition of the Common Law and condemnation of General Warrants.

That was the cause that brought that famous case into the English courts, and we are safe in say-

ing that by the Fourth and Fifth Amendments, Congress also intended to follow the English House of Commons and give those pernicious General Warrants a fatal blow, and forever outlaw them.

But General Warrants were not eradicated by the Fourth and Fifth Amendments and the reports of the appellate tribunals show many cases were being decided involving their constitutionality. The Congress stood patiently by for 126 years from 1791, until June 15th, 1917, when the Espionage Law was enacted, which included the present Search and Seizure Laws. No doubt the Search and Seizure Law is one of the most polished and most perfect laws that ever was enacted by a legislative body. It has had its trial for about eight years and it has in part failed to accomplish its purpose. It was expected that it would soon announce a requiem for that great enemy of human liberty—General Warrants—but in the parlance of Main Street,—Nothing Doing.

Vol. 40 U. S. Stat. page 230.

The search and seizure law, proper, is composed of 23 Sections and some 18 Sections were primarily enacted to preserve and perpetuate forever the rights of the American people to their

liberties, their homes and their property, and especially against unlawful searches and seizures, but with sorrow it may be said that of these 18 preservative Sections, from 10 to 14 have been annulled and made inoperative by the jury trial courts in this Great Nation.

What is the true test of a valid Warrant?

Is it what will an officer do, or what can he do, or what is he commanded to do?

If a warrant commands an officer to do and perform an unlawful act, is it void or voidable? That is, if he refrains from doing the unlawful act, is the warrant valid, and invalid if he does the unlawful act? Suppose a man is commanded to arrest and kill a man who is wanted on a criminal charge, and he arrests the man and brings him before the court—is that warrant void?

Turn to page 32 of the record and we find a part of the Search Warrant as follows:

> * * * "and to search the person of said above named persons and from him or her, or from said premises seize any or all of the said property, documents, papers and materials" * * * That includes private papers.

The above quotation makes the Warrant in question a "General Warrant."

The Fourth Amendment and the Act of June 15th, 1917, had two purposes in view—to make more certain and definite the statements contained in the application for a search warrant and to abolish the use of General Warrants.

A general search Warrant in effect says to the officer "Go search your man, or his house, or both, bring to the court all the documents and papers you can find."

A warrant that contains the legal elements required by the Fourth Amendment and the Search and Seizure Laws of 1917, says to the officer "Go search your man, or his house or both, for property, or papers that are *particularly described* in the application for a warrant, and in the warrant."

In England and America private papers are held sacred. In England by the common-law, and in the United States by the Fifth Amendment, as well as the common law of England. The Fifth Amendment was taken from the English common Law, and you will find it in Lord Camden's great decision. The appellate courts of both Nations followed unbroken lines. An officer dare not touch a private paper or personal effects to be used as evidence under a warrant. But that is just what officer Whitney did in this case under a General

Warrant, and General Warrants have been in universal use in Seattle ever since the Volstead Law became operative, and in this case a General Warrant was held valid.

Considering the many and persistent efforts that have been made in England and the United States to crush and stifle these unjust, dangerous and pernicious General Warrants, it seems incomprehensible that after the lapse of more than a century from the time this great legal battle was inaugurated in the United States against them, there could be found one single court that would encourage and permit their use. The *Gouled*, the *Boyd*, the *Weeks* and numerous other decisions of the Supreme Court of the United States cry out in denunciation of violations of constitutional rights, and we know of no appellate court decision that has ever abetted the use of these General Warrants, because they are condemned by our Sacred Constitution, the Laws of Congress and the conscience of man. They are void, absolutely void.

In *Renigar vs. United States,* 172 Fed. 655, Par. 2, Justice Bradley is quoted as follows:

> "Illegitimate and unconstitutional practices get their first footing by silent approaches and slight deviations from legal mode of Proceedure * * * It is the duty of all courts to be watchful

for constitutional rights of the citizen, and against any stealthy encroachments.

"Obsta principils"—"Resist the first beginning."

See the following citations:

Gouled vs. U. S., 255 U. S. Rep. 305.
Maresea Case, 266 Fed. 725.
U. S. vs. Boyd, 116 U. S. Rep. 627.
U. S. vs. Weeks, 232 U. S. Rep. 383-391.
U. S. vs. Silverthorn, 251 U. S. Rep. 385.

There are other objections to the Search Warrant. The warrant names the owners of the Cascade Soda Water Company and correctly describes the place as rooms No. 606.

On page 52 of the record a map or diagram shows the location of rooms 606 and 606 was raided by the prohibition officers. There was some distilling going on there and barrels with mash and other receptacles were destroyed, notwithstanding, destruction of seized property is unlawful under the Search and Seizure Laws.

It may have been intended to describe the boiler room and the two other rooms on the west, but if such was the intention it was a flat failure. The description of the place reminds one of Bloke's Item, concerning which Mark Twain said: "Con-

sidering the great circumstantiality of detail, it don't contain as much information as it ought."

On page 28 of the record in the last line commencing at the word "including the two doors on each side thereof and the premises on each side of the rear thereof, and on the premises used, operated and occupied in connection therewith and under control and occupancy of said *above parties.*" But defendant was not one of the above parties.

The affidavit for a search warrant and the search warrant were both written to cover rooms 606. The proprietors of 606 were named and the stenographer who wrote the papers evidently thought that the boiler room and the two other rooms were occupied by the owners of the business in 606, because the Warrant, Record page 31, reads at the end of the first paragraph, "operated and occupied in connection therewith and under the control and jurisdiction of said 'above parties'." The above parties named are K. Hara, R. T. Oka and K. Tokyo, proprietors and employees of 606 and for the reason that they were mistaken as to the occupancy of the expressman's rooms and the boiler room, the name of the expressman and the Plaintiff in Error, K. Matusake, were omitted. But mistake or no mistake, a search warrant must name the per-

son, or describe him. A fictitious name is insufficient.

(I might add for the information of the court that the diagram on page 52 should be read that the top of the map faces east, to the right north, and to the left, south.)

Another objection to the validity of the search warrant and an objection which we believe renders the search warrant absolutely invalid and therefore, the evidence obtained thereunder, incompetent and inadmissible is the absence of any statement whatsoever in the search warrant by the Commissioner who issued the same "stating the direct grounds or probable cause for its issue."

The search warrant was issued under the Search Warrant Statutes being Sec. 6 of the Act of June 15th, 1917, which reads as follows:

> "Issue-Contents—If the judge or commissioner is thereupon satisfied, of the existence of the grounds of the application or that there is probable cause to believe their existence, he must issue a search warrant, signed by him with his name of office, to a civil, officer of the United States duly authorized to enforce or assist in enforcing any law thereof, or to a person so duly authorized by the President of the United States, *stating the particular grounds or probable cause for its issue* and the names of the persons whose affidavits have been taken in sup-

> port thereof, and commanding him forthwith to search the person or place named, for the property specified, and to bring it before the judge or Commissioner."

It might be safely assumed that when Congress used the underscored language in the above quoted Statute, that said language had some meaning, otherwise, it would not have been contained therein, and it seems reasonable that the meaning which should be attached to said language is nothing more or less than what said language says, that is, that in issuing a certain warrant and as part of the contents thereof, the Commissioner *must* state the direct grounds or probable cause for its issue. Now referring to the affidavit upon which said search warrant was issued. It can be seen that the alleged probable cause or direct grounds upon which said search warrant was issued was that part of said affidavit which reads:

> "and that in addition thereto affiant on said 11th day of March, 1924, and on previous occasions detected the odor of intoxicating liquor on said premises * * * "

Because the agent could smell liquor from afar, is not sufficient excuse for annulling and setting aside Secs. 3, 4, 5 and 6 of the Act of Congress of June 15th, 1917, the so-called Search and Seizure Act, which requires supporting affidavits or depo-

sitions, and the names to be written of the persons making this corroborating proof into the Search Warrant.

The Government Agent and the Commissioner who issued the warrant, supported by the trial court, set aside, and for the purposes of this case, absolutely annulled four sections of an Act of Congress and the Fourth Amendment to the United States Constitution, on the theory that if an agent could detect the odor of liquor, it did away with the requirements that the allegation of probable cause be supported before a Search Warrant can be issued.

The matter contained in the affidavit and application for search warrant, immediately preceding the portion quoted hereinabove, as under previous decisions of the Federal Courts of this Circuit Court of Appeals as decided in the case of *Lochnane vs. U. S.* referred to in 2 Fed. (2nd) 427, has no statement whatsoever of probable cause, but is simply a conclusion of law by the affiant, and that being true its incorporation in the search warrant is not a statement of pobable cause, and without the search warrant itself containing a statement by the Commissioner of the probable cause, upon which it was issued, then under Section 10496¼F the search warrant is absolutely void and that Section of the Statute needs to have something striken out of it.

The probable cause, if any, is alleged, is English law, and not American.

The affidavit for a warrant was verified by Mr. Whitney and he says that on the 11th day of March, 1924, and on previous occasions he detected the odor of intoxicating liquor on said premises, that is room 606, not the boiler or expressman's room.

The smelling ability of the affiant will not be challenged nor denied, but we do not believe that inhaling the not disagreeable odor of an intoxicating beverage will supply the failure of the officer to have his affidavits for a warrant supported by witnesses, and their names in the warrant as the Search and Seizure Law directs, and commands, in Sections 4, 5 and 6 of said Search and Seizure Act.

The Secretary of the Interior seems to have taken our Constitution and the acts of Congress seriously for in his revised rules and regulations which were revised in March, 1924, in Section 2220, page 198, says:

"The constitutional and Statutory limitations upon searches and seizures must be scrupulously observed by investigating officers. Where a search warrant is required for such entry and search, no attempts should be made to enter any other premises protected by such limitations nor to take any property therefrom."

In this cause a limitation, both constitutional and statutory, existed and both required that the name of the plaintiff in error should appear in the affidavit and the search warrant and also that the place to be searched should be particularly described.

Section 12 of the Search and Seizure Law requires that when any property is taken, a copy of the warrant together with a receipt for the property taken by him, be given to the party named or in whose possession it was found, etc.

The return of the officer fails to state a compliance with the act of Congress in that respect. The object of requiring a receipt to be given is apparent, and should be given to the person accused. (See pages 32-33 of Record.)

Section 13 of the Search and Seizure Act requires the officer to verify his return and provides a form to be used. This was omitted and presumably intentionally, because the plaintiff's person was searched and his personal effects and private papers were forcibly taken from him under a warrant that did not have his name, and the evidence thus secured by the unlawful seizure was used, and largely contributed to his conviction, and when the defendant asked for the return of his property so

unlawfully taken, the prohibition officer hit him in the face with his fist and injured his hand so that first aid had to be administered to the officer's hand to stop the flow of blood.

See affidavit of K. Shitama, Record page 35-36.

See affidavit of Kiyoshi Muracks, Record page 36-37.

See affidavit of M. Matsusaka, Record page 33-34-35.

This was a violation of Section 21 of the Search and Seizure Law which reads:

> "Sec. 21. An officer who is executing a search warrant wilfully exceeds his authority, or exercises it with unnecessary severity, shall be fined not more than $1,000 or imprisoned not more than one year."

which violation rendered officer Justi liable to criminal prosecution and punishment for his unlawful act.

A false return was made in this case and when the attention of the officers was called to it at the hearing of the motions to quash the warrant and to suppress the evidence, no request was made to supply a truthful return.

An officer is bound by his return.

MISDEMEANOR OR FELONY.

Plaintiff in Error claims that the search warrant is void because he was charged with the commission of a misdemeanor and that under the Federal Prohibition Laws, it can only be issued in felony cases. The only sections of the Volstead Act authorizing searches and seizures for violation of the Federal Prohibition Laws and the only sections under which a Search Warrant can be issued are those herein quoted being Section 25, Title 2 of the Volstead Act and the latter part of Section 2, Title 2 of the same Act.

Section 25, Title 2 of the Volstead Act in part says:

> "A search Warrant may issue as provided in Title XI of Public Law numbered 24 of the Sixty-Fifth Congress approved June 15, 1917," known as the Search and Seizure Act."

The latter part of Section 2, Title 2 of the Volstead Act is as follows:

> "Section 1014 of the Revised Statutes of the United States is hereby made applicable in the enforcement of this Act. Officers mentioned in said Section 1014 are authorized to issue Search Warrants under the LIMITATIONS provided in Title XI of the act approved June 15, 1917," which is the Search and Seizure Act. (Capitals are ours.)

Section 2 of the Search and Seizure Act reads:

> "A search warrant can only be issued, when the property was used as a means of committing a FELONY; in which case it may be taken on the warrant from any house or other place in which it is concealed or from the possession of the person by whom it was used in the commission of the offense, or from the person in whose possession it may be." (Capitals are ours.)

Boyd vs. U. S., 116 U. S. Rep. 626, is as follows:

> "It has been the law of the Federal Courts that advantage to the government is not an adequate reason for overlooking a disregard by its officers of the constitutional rights of an individual."

Under the word "limitations" quoted in the preceding Section, it certainly appears that a Search Warrant in prohibition cases can only be in felony causes.

Section 1 refers to stolen and embezzled property and Section 3 refers to foreign affairs, and only the sections quoted are applicable to the enforcement of the Volstead Act. Section 2 only, applies to prohibition cases.

This Section need frighten no one. It is borrowed from the common law. The English always took the Search and Seizure laws very seriously and the use of that legal weapon was not permitted in misdemeanor cases.

Mr. Volstead thought he had a perfect law, but he slipped when he put his Prohibition Law under the guidance of the Espionage Act.

With this law staring one in the face, I ask by what authority do officers take, or the court admit in evidence, property used as a means of committing any other offense than a felony?

By what authority of law, can a court or Commissioner issue a search warrant to take property used as a means of committing a misdemeanor, and I might ask, is a warrant good unless it uses the word, "felony"?

In the leading, and much quoted *Gouled* case, 255 U. S. Supreme Court Reports, page 296, the Search Warrant was given in part in the opinion written by Justice Clarke, and the warrant properly limited the search to property *used as a means to commit a felony,* and other mention is made of that law in the same reported case.

SUFFICIENCY OF EVIDENCE.

The defendant claimed at the trial, and at all times that he was not the owner of the seized liquor in the three unnumbered rooms and was not interest-

ed in it in any manner and did not know it was there. It was hid in locked boxes and suit cases and a part was stored in a wall in an abandoned stairway. The defendant was compelled to pass through these rooms for the purpose of firing the boiler that supplied hot water and heat for his hotel. It is common knowledge that dealers in contraband liquor resort to all manner of devices to hide the same and the defendant could pass through the rooms several times daily and not discover the liquor.

To guard against suspicion and possible arrest as well as to preserve his good reputation, the defendant and his wife went down to the basement and showed officer Whitney the lease and told him of the bootlegger who was the owner of the liquor. (Record pages 50-51-2.)

Officer Justi said in his evidence that defendant admitted he owned all the liquor and afterwards denied it. It is with difficulty that defendant speaks English and after a trial the court directed that an interpreter be sworn, so it is possible that officers Justi and Whitney may not have correctly understood defendant. That is a charitable view, however, for this reason, that these two witnesses, Justi and Whitney, have the habit of testifying to con-

fessions in all their liquor cases and the court records will show such to be the case.

These two officers also testified that the defendant kept baggage in their rooms. How did they know that? The testimony of Nchida (Record page 43) who acted as interpreter and who had lived in the hotel about three years said the defendant had two baggage rooms in his hotel, one on the second floor and one on the third floor.

The testimony of Justi and Whitney doesn't fit the truth but it isn't a misfit to falsehood for this reason: With baggage rooms on the second and third floors, the arrangement would be most convenient and why should defendant carry the baggage from the second and third floors to the sidewalk on the first floor, then turn at the southwest corner of the building and carry the baggage two-thirds of the length of a long building to the basement door, when he had 60 rooms in his hotel and his office would supply one baggage room and only take out one room on the third floor out of the 60, for baggage.

Such testimony is a misfit—it doesn't fit the truth and it is so self-evidently ridiculous that it really doesn't fit in anywhere.

When defendant showed officer Whitney the lease, the witness Whitney in his testimony, (Record page 41) said: "I told him to go and find the expressman and if he found him I would not arrest him. He went away and when he returned he said he could not find him then I arrested him."

But Whitney testified that defendant confessed his guilt and also that the unnumbered rooms were used for baggage rooms by defendant, and Whitney also said defendant was the guilty man, and yet, with brazen effrontery, this witness, an officer and assistant director, admits in open court that if the defendant had found the expressman, the defendant, the one guilty man, the confessed criminal, would not have been arrested.

The testimony of defendant reads like the evidence of an innocent man. He was offered immunity if he found the expressman who skipped out, because he could not produce the guilty man the defendant was arrested, thrown into jail, tried and convicted on evidence that is most doubtful in many respects. When defendant offered the evidence to show his innocence, and which evidently convinced the officer that the rooms were leased, why make the production of the guilty party a condition? If, as Mr. Whitney said, they "had the

right man," why offer to turn a guilty man free if he produced another man? Apparently some one must be convicted and it did not matter whether it was the expressman, who is the guilty party, or some one else. If defendant was not believed to be the guilty party, Why, I repeat, was the expressman permitted to go free. Whitney's explanation doesn't explain.

If the defendant was the only guilty man as Whitney says, why did he send for the expressman. According to Whitney, the expressman who was seen handling the liquor the liquor in question by Nchida, Record page 43, was innocent. The facts indicate that Whitney's vengeance was meted out to defendant because the expressman skipped out and could not be found.

At this time it may be timely and proper to call the attention of the court as well as that of Mr. Whitney to what the Secretary of the Treasury, Mr. Whitney's superior, says about the duties of a prohibition officer, and the following is taken from "Regulations 60, Relating to Intoxicating Liquor":

> "Sec. 2210. Reports of investigating officers—Investigating officers will render prompt written reports of all detected violations. Such reports will be sworn to by the reporting officer and will show all pertinent facts, favorable as

> well as unfavorable to the accused; if there is more than one investigating officer, the report will show what facts are within the knowledge of each. If the accused person is present when the investigation is made, he should be invited to make any voluntary statement he pleases, oral or written, and such statement should be included in the report. If he desires to swear to the statement, his oath should be taken by one of the investigating officers."

The defendant took his wife with him and told the officers who owned, bartered and sold that liquor, if anyone did, that it was an expressman who leased the rooms. Nchida testified to enough criminating circumstances to convict the expressman, but he was never molested, although he was in Seattle for the past year.

Officers Whitney and Justi both testified that they destroyed no barrels in room 606. This evidence is material to defendant in several respects. One is that these two officers seem to have no regard for the truth. It is a common practice for them to destroy bars, liquor and all receptacles without the order of the court, and it seems strange that they should deny what occurred when the raid in question was made.

Mr. Parshal, a witness for the defense, described the condition after the officers left. (Record, page 47.)

The defendant testified that after his arrest he was given an axe and compelled by the officers to assist in destroying barrels. (Record, page 47, paragraph 1.)

Whitney and Justi positively denied destroying any barrels. This evidence was willingly and cheerfully given. Two witnesses denied the evidence of the officers. We will take a look at the officer's return, Record, page 32-33. If the officers were mistaken in this, perhaps their evidence should not be too strongly relied upon on other points.

RETURN OF SEARCH WARRANT.

Returned this 13th day of March, A. D. 1924.

Served and search made as within directed, upon which search I found 182 gallons of distilled spirits, (D. S.) 178 destroyed 2 lock and keys, 7 suit cases, held as evidence and samples of grape wine, 1 package papers, 33 boxes raisins, 1 press, 14 sacks sugar, 1 raisin grinder, 2 gallon metal cans.

Destroyed 13 gals. grape wine, 7 100 gal. bbls., 12 50 gal. bbls., 65 10 gal. kegs, 15 5 gal. kegs, 1 stove.

H. J. Stetson.

This return shows that in executing the search

warrant the officers destroyed 19 barrels, and 80 kegs.

Who told the truth, Whitney and Justi, or Parshal, the defendant and the officer's return? This return fails to mention that plaintiff in error was searched and some keys and paper were taken from his person. A warrant returned without a written return is void. A false return on a warrant also makes it void.

A warrant of every nature becomes absolutely void without a written return. This return in cases where the service is made by officers need not be verified, but an exception is made in the Search and Seizure Act, and all returns thereunder must be signed and sworn to and Sec. 13 of the Search and Seizure Act goes so far as to provide a form of the affidavit. In this case the verification was omitted and is not the warrant void without such a return as the law directs shall be made? Vorhees Law of Arrest, Sec. Ed., Secs. 35-37, inc., 39-45.

In view of such evidence, counsel requested the court orally, to instruct the jury on falsus in uno, falsus in omnibus, and also that owing to the defendant not being able to speak or understand the English language fluently, such evidence should be considered with caution, or words to that effect.

The court refused to instruct as requested, or at all. The court instructions were orally given. No suggestion was made that the instructions asked for should be reduced to writing.

The instructions should have been given.

We think it reversable error to refuse.

The officers forcibly searched defendant for evidence with which to convict him and used a key for that purpose. The search was a trespass as hereinabove shown. That a bunch of keys in a 60-room hotel contains a key or perhaps more, that opened one of the bootlegger's boxes is evidence, but not of such weight to sustain a conviction. Take that evidence out of the case and the prosecution has nothing left.

No living man can testify truthfully that appellant ever sold, or offered to sell or had in his possesion any intoxicating liquor, and the evidence of officers and others is to the effect that he is a law abiding man and that for four years he was never molested or suspicioned until charged in this case by men whose written evidence and testimony show them to be untruthful and law violators, and but one piece of circumstantial testimony supplied by the evidence unlawfully taken from appellant's

person and introduced at the trial, tended to show even a trace of guilty knowledge and that evidence is too flimsy to support a conviction.

For four years not a breath of suspicion was ever directed against defendant or his hotel. When two bootleggers secured rooms there and were arrested, that good reputation of defendant's remained the same. When the officers needed assistance, the defendant assisted them in every way possible. For four years, and all his life never arrested until Whitney found it necessary to arrest him because he could not produce the guilty party.

> "I don't know of a cleaner place in that district than the hotel conducted by defendant at 604½ 6th Avenue South. Not only as to liquor and bootlegging but we never took a woman out of his hotel. * * * His reputation and his hotel have the very best and highest reputation in the police department."

That is what Sergeant Griffiths said under oath of the defendant and his hotel when a witness in this trial.

The second count charges maintaining a nuisance by manufacturing, keeping, selling and bartering intoxicating liquor.

Who testified to manufacturing by defendant?

Who testified to selling by defendant?

Who testified to bartering by defendant?

Who testified that defendant was keeping liquor.

No one.

Defendant proved himself innocent before he was arrested without warrant, searched without warrant, thrown into jail without authority of law. Forced to use an axe in breaking up barrels while under arrest.

With hundreds of gallons of liquor stored up, if the defendant had been implicated, some removals or sales could be proven against him. A man is fortunate who can prove as good a reputation as the defendant possesses and established in court.

Shall this man, on such flimsy and doubtful evidence, stand convicted of violating the laws of the United States and be forever branded as a criminal and outlaw?

Very respectfully submitted,

ADAM BEELER,

Attorney for Plaintiff in Error.